IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 176 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANU PREMJI MARADIA

Versus

CG PATEL, JOINT REGISTRAR

Appearance:

1. Special Civil Application No. 176 of 1992
MRS SANGEETA N PAHWA for Petitioner No. 1
MR JB PARDIWALA for Respondent No. 1
GOVERNMENT PLEADER for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 19/06/2003

C.A.V. JUDGEMENT

(Per : MISS JUSTICE R.M.DOSHIT)

This writ petition arises from the claim made by the petitioner for retiral benefits calculated on the basis of the last pay drawn by him. The matter has been placed before us on a reference made by His Lordship Mr.Justice M.R.Calla on following issues :

(I) Whether the Court can do any wrong to any party by giving the interim relief and then permitting the withdrawal of the case without adjudicating the basic dispute raised in the main case ?

(II) Whether in the service matters, the dispute in a case is raised about the date of birth by a party for continuance beyond a certain point of time and such employee continues on the basis of interim orders passed by Court in such case and the case is ultimately got dismissed as withdrawn is such an employee entitled to the retiral benefits on the basis of the last pay drawn by him on the date on which he actually retired or he should get the retiral benefits on the basis of the last pay drawn by him on the date on which he ought to have retired ?

The facts leading to the present petition are as under :

The petitioner joined the service in the Judicial Department as a Peon on 9th August, 1948. At the time of his joining service his date of birth was recorded as of 1st July, 1927. In the year 1959 he was promoted as Bailiff. In view of the said date of birth of the petitioner he would have retired on reaching the age of superannuation (i.e. the age of 58 years) on 31st July, 1985. The petitioner claims that his date of birth is 15th June, 1930. However, the same was erroneously recorded as that of 1st July, 1927. The said mistake was noticed by the petitioner somewhere in the year 1964. The petitioner did bring this mistake to the notice of the concerned officer of the District Court and made request to correct the error. Be it noted that, except the above referred bare statement, there is nothing on record to indicate that at any time prior to the suit in question the petitioner had raised dispute as to the correctness of the service record especially in respect of the birth date. Nevertheless, the petitioner at the

fag end of his service i.e. a few days before the due date of retirement approached the Civil Court. The petitioner instituted Regular Civil Suit No.532/1985 in the Court of Civil Judge (S.D.), Rajkot against the State Government. The petitioner claimed that his correct date of birth was 15th June, 1930. He also prayed that the respondent State be restrained from retiring the petitioner on 31st July, 1985 after office hours. Along with the suit, he also moved Application Ex.5 for injunction. The learned trial Judge rejected the said application under order dated 22nd July, 1985. The said order was challenged before the learned Assistant Judge, Rajkot in Civil Misc. Appeal No.143/1985. The learned Assistant Judge, Rajkot, under the judgment and order dated 30th July, 1985, allowed the said Appeal and directed to issue ad-interim injunction against the defendant "restraining it from causing retirement of, or retiring, the plaintiff from service on the basis of birth date of 1927 as recorded on his service roll or as on 31-7-1985 and further it is directed that the plaintiff be continued in service on the basis of birth date as on 15-6-1930, or as may be decided in the suit, whichever is earlier, till the final hearing and disposal of the suit under Order 39 Rules 1 and 2 of the Code of Civil Procedure." Feeling aggrieved, the State Government preferred Civil Revision Application No.1566/1985 before this Court. Initially, under order dated 26th November, 1985 (Coram: B.S.Kapadia, J.) the impugned order of the Assistant Judge was stayed. However, on an application made by the petitioner the said stay was vacated on 23rd December, 1986. Thus, though he had reached the age of superannuation and was due to retire on 31st July, 1985, the petitioner, on the strength of the aforesaid order dated 30th July, 1985, continued in service. He was actually retired from service on 31st August, 1988. After his retirement, the petitioner moved the Civil Court and sought leave to withdraw the suit. Under order dated 29th September, 1988 the petitioner was allowed to withdraw the suit.

The question thus arose whether the terminal service benefits of the petitioner shall be calculated on the basis of his actual date of retirement i.e. 31st August, 1988 or should they be calculated on the basis of the due date of retirement of the petitioner i.e. 31st July, 1985. In the circumstances, the petitioner has preferred the present petition under Article 226 of the Constitution of India and has claimed that all his retiral benefits should be calculated on the basis of the actual date of retirement from service and the last pay drawn by him.

The petition came-up for hearing before His Lordship Mr.Justice M.R.Calla on 30th August, 2001. Reliance was placed on the judgment of this Court in the matter of BACHU LAXMAN VS. UNION OF INDIA AND ORS. [1984(2) G.L.R. 1336]. In the said judgment, this Court has taken a view that what is relevant is the actual date of retirement from service and the last pay drawn. His Lordship Mr.Justice M.R.Calla, however, could not agree with the said view. In the opinion of His Lordship, "if a person has continued in service on the basis of some interim order passed by the Court and later on seeks permission to withdraw, the suit/petition after the purpose is served, he can at the most, claim that the salary drawn by him may not be recovered. He cannot be given any retiral benefits, on the last pay drawn on which he retired on the strength of the interim order. Since the petitioner seeks to withdraw the main case without getting the main case decided on merits and the issue is not allowed to be adjudicated by the court, such party cannot be allowed to have the benefit of his service rendered beyond certain age under the interim orders."

In view of the above opinion expressed by His Lordship the above mentioned reference had been made to a Larger Bench and has been placed before us for consideration.

The learned advocate Mrs. Pahwa has appeared for the petitioner. She has submitted that what is relevant is the date of actual retirement from service and the last pay drawn. She has relied upon the Rules 230, 239, 278, 307 and 327 of the Bombay Civil Services Rules, 1959 (hereinafter referred to as 'the Rules'). She has also relied upon the judgment of this Court in the above referred matter of BACHU LAXMAN V/S. UNION OF INDIA & ORS. [1984(2) G.L.R. 1336] and on the judgment of the Punjab and Haryana High Court in the matter of KAKA RAM MAHAJAN V/S. THE SECRETARY, IRRIGATION AND POWER, PUNJAB STATE, CHANDIGARH AND ORS. [1972 S.L.R. 671].

Mr.Pardiwala has appeared for the respondents and has contested the petition. He has submitted that it is the settled law that no party to a litigation can be permitted to take undue advantage of the interim order passed in his favour. He has submitted that in the present case indisputably the petitioner did not allow the matter at issue to be adjudicated by the Civil Court. Nevertheless, he did enjoy the interim order granted by the Civil Court. In the circumstances, not only the

petitioner should not be allowed to enjoy the fruits of the said interim relief but he shall also indemnify the respondents for the injury suffered by them. He has also submitted that the date of retirement shall mean the date on which the petitioner was due to retire under the prevalent law. Similarly, the words "last pay drawn" would mean the last pay drawn by the petitioner on the due date of retirement as envisaged under the relevant rules. In the submission of Mr.Pardiwala, the date of birth of the petitioner as it is recorded in the service roll was 1st July, 1927. The petitioner should have retired from service on attaining the age of 58 years i.e. on 1st July, 1985 (31st July, 1985 under the prevalent Government policy). Hence, the petitioner's pension and other retiral benefits are liable to be computed on the basis of the due date of retirement and the pay drawn on such date. Whatever benefits the petitioner received under the interim order of the Court shall be ignored. In support of his contention, Mr.Pardiwala has relied upon the judgments of the Hon'ble Supreme Court in the matters of STATE OF U.P. AND ORS. V/S. HARENDRA KUNWAR [1995 LAB.I.C. 2471]; of RADHA KISHUN V/S. UNION OF INDIA AND ORS. [JT 1997(4) S.C. 116] and of Kerala High Court in the matter of M.KRISHNAN NAIR V/S. STATE OF KERALA AND ORS. [1996(3) SLR 716].

Rules 181 to 332 of the Rules are placed under the heading "Pensions" in Chapter XI of the Rules. Rule 230 provides, inter alia, that a Government servant is in pensionable service if he holds substantively a permanent post in Government service or holds a lien on such a post. Rule 239 of the Rules provides that the periods mentioned therein shall be treated as duty performed by a Government servant counting for pension. Rule 278 of the Rules provides, inter alia, that the amount of pension of a Government servant is fixed by reference to the number of completed years of duty which counts for pension and the amount of his pensionable pay. Rule 307 of the Rules provides, inter alia, that a pension shall be payable from the date on which the pensioner ceased to be in Government service. Rule 327 of the Rules provides, inter alia, that a Government servant who has received a pension on retirement shall not, if re-employed in Government service, be permitted to count his new service as qualifying for a second pension. If the new service is pensionable, it must be combined for the purpose of calculating pension with the service previously rendered and the whole treated as one service. Mrs.Pahwa has submitted that in the event the Court holds that the petitioner was not entitled to continue in service after the due date of his retirement i.e. 31st July, 1985, the

services rendered by the petitioner after the said date shall be counted as re-employment and be treated as such for the purposes of pension and other retiral benefits.

In the matter of Bachu Laxman (supra), the petitioner Bachu Laxman was a workman employed in the erstwhile Bhavnagar State Railway and, on merger of the Bhavnagar State with the Union of India, he was absorbed in the Railway administration. The said Bachu Laxman preferred a petition under Article 226 of the Constitution of India and claimed that under the condition of service prevalent in the former State of Bhavnagar, the said petitioner was entitled to continue in service upto the age of 60 years. The said benefit remained vested in him and, therefore, he could not be superannuated at the age of 58 years as per the correct interpretation of the relevant rules. Pending the petition, the said Bachu Laxman was granted ad-interim relief against retirement. Thus, the said Bachu Laxman continued in service until he attained the age of 60 years. In the circumstances, this Court, following the judgment in Special Civil Application No.1336/1975 decided on 25th April, 1977 (Coram: D.A.Desai, J. as he then was), held that "the petitioner has continued to serve under the interim relief granted by this Court and, therefore, the various retirement benefits should be fixed on the basis of the benefits that accrued to him on the basis of the last pay drawn and the retirement should not be fixed on the basis that the petitioner had retired on some earlier date i.e. 31st March, 1981." In the aforesaid Special Civil Application No.1336/1975 in some what similar case the learned Judge observed that "...Whether I like it or not, that is the law. Rules at present governing retirement benefits especially pension and gratuity referred to the average of 10 months' last salary. It is immaterial that he continued to enjoy the benefit under interim relief granted by the Court and for that he has been in receipt of this benefit."

In the matter of Kaka Ram Mahajan (supra), the writ petitioner who retired from service on 10th March, 1960 claimed a higher pension than what was sanctioned to him. The said claim was accepted by the State Government after some years and higher pension was sanctioned to the said petitioner from the date of the sanction. The said petitioner raised a dispute and claimed that the higher amount of pension should be made available from the date he retired from service and became entitled to receive the pension. While resolving the said dispute, the Court observed that the Government had kept the representation of the petitioner in abeyance for six years, and then in

order to avoid financial liability for payment of the enhanced amount, fixed the date on which it took the decision. The Court held that "...It could not be permitted to take advantage of its own default, and there is no reason in equity or good conscience which permits such a course to be followed."

In the matter of Harendra Kunwar (supra) also, the respondent Government servant, on receiving the notice of retirement on completion of 58 years of age, preferred a writ petition before the High Court contending that he was entitled to continue in service till he attained the age of 60 years and obtained interim order for his continuance in service. After he retired from service on attaining the age of 60 years, the High Court allowed the petition to be disposed of as infructuous without adjudicating the issue of the age of retirement. The High Court also issued direction for payment of pensionary benefits. In Appeal by the State Government, the Hon'ble Supreme Court observed that "...The High Court should have realised that he had reaped the benefit of an extended service of two years under an interim order of the High Court. The High Court should, therefore, have considered whether he deserved that benefit or did not deserve it as per the rules. If he did not deserve it the High Court ought to have recorded a finding in that behalf and should also have directed him to refund the benefit that he had received by way of undeserved continuance in service." While ordering the remand of the matter to the High Court, the Hon'ble Supreme Court directed "...We may also make it clear that if the High Court comes to the conclusion that the age of retirement was correctly determined by the State Government as 58 years the High Court will deduct the undeserved benefit which the respondent reaped by continuance in service for two years beyond the age of retirement of 58 years and deduct the salary and allowances from the terminal benefits which the respondent would be entitled to and also make a specific direction in that behalf at the time of fixation of pensionary benefits. It is time that such an action is taken to deter people from questioning the age of retirement or date of birth at belated stages; otherwise that tendency to bring such cases and reap the benefit under interim order will not be controlled."

In the matter of Radha Kishun (supra), the appellant who was to retire from service on 31st May, 1991 continued in service upto 31st May, 1994. When the action was taken to recover the amounts paid to him for the period beyond the date he was to retire, he

approached the Central Administrative Tribunal, Patna. In an appeal to the Hon'ble Supreme Court against the decision of the Tribunal, the Hon'ble Supreme Court held that "...It is true that the petitioner worked during that period, but when he is not to continue to be in service as per law, he has no right to claim the salary etc. It is not the case that he was re-employed in the public interest, after attaining superannuation." In answer to the contention that "the petitioner would have conveniently secured gainful employment elsewhere and having worked, he cannot be denied of the legitimate salary to which he is entitled to", the Hon'ble Court replied "we cannot accept the contention and give legitimacy to the illegal action taken by the authorities. If the contention is given acceptance, it would be field day for manipulation with impugnity and one would get away on the plea of equity and misplaced sympathy. It cannot and should not be given countenance."

In the matter of M.Krishnan Nair (supra), the petitioner who was due to retire on 31st July, 1989, with a view to delaying his retirement, lodged a claim that his age of retirement on superannuation was 60 years. Under the interim order he continued in service till 4th January, 1995. The petition was disposed of stating that it had become infructuous. It was also made clear that if the appellant was continuing in service till 4th January, 1995 he would be entitled to get his pay and allowances for the said period. For the claim made by the said appellant for disbursement of certain benefits for the period of extended service, the Division Bench of the High Court observed that "...It is an accepted legal principle that a Court will not pass any order which goes against any existing law, rules or orders on the subject. If really the appellant is not entitled to get the benefit of periodical enhancement in various allowances and increments, this Court's order can never be pressed into service to claim those unmerited advantages."

The above referred judgments of the Hon'ble Supreme Court take a view that in case of challenge to the date of retirement of a Government servant, the matter at issue has to be adjudicated. The Hon'ble Court has deprecated the tendency of the Government servants to challenge the date of retirement at the fag end of the service career, to continue in service beyond the due date of retirement under the protection of the interim order of the Court and to withdraw the matter once the purpose is served. In such cases, the due date of retirement, according to the official records, has to be

considered to be the relevant date for the purposes of the computation of the retirement benefits. The Hon'ble Court has gone to the extent that all the benefits earned after the due date of retirement shall be recovered from the concerned Government servant. The plea that such service shall be deemed to be the period of re-employment has also been rejected.

In above view of the matter, the judgments of this Court in the matter of Bachu Laxman (supra) and in Special Civil Application No.1336/1975 cannot be said to be a good law.

We are also of the opinion that the date of retirement and the last pay referred to in the above referred rules of the Rules would necessarily mean the due date of retirement according to the official records and the prevalent rules of retirement. The last pay drawn would mean the pay and allowances received on such date. Continuance of a Government servant in service beyond the due date of retirement under protection of the interim order of a Court of law is a fortuitous circumstance which shall not confer any additional benefit over such Government servant unless the Court adjudicates the matter at issue in favour of such Government servant. No litigant can claim benefit under interim order of a court unless the matter at issue is finally adjudicated in favour of such litigant. In case such issue is decided against the concerned litigant or is not decided at all such litigant shall be liable to indemnify the party which has suffered loss or injury on account of the operation of the interim order.

The reference is answered accordingly.

As recorded hereinabove, the date of birth of the petitioner herein was entered as that of 1st July, 1927 and he was due to retire, according to the prevalent rules, on 31st July, 1985. Just days before the due date of retirement he instituted the suit for declaration that his correct date of birth was 15th June, 1930 and not 1st July, 1927. The petitioner prayed that the State shall be restrained from retiring the petitioner on 31st July, 1985. The trial Court refused the interim injunction. However, the same was granted by the first Appellate Court and the interim protection was confirmed by this Court. Thus, under the protection of the order of the first Appellate Court, the petitioner continued in service beyond the due date of retirement i.e. 31st July, 1985 upto 31st August, 1988. Having availed of the benefit of the protection granted by the Court, the

petitioner did not allow the claim to be adjudicated. Instead he withdrew the suit.

It would not be out of place to mention here that though the petitioner was serving as Bailiff in the District Court, Rajkot; in the suit instituted by him the District Court was not impleaded as the party defendant. Further, the factum of the Civil Revision Application No.1566/1985 preferred by the State of Gujarat and the orders made thereon has not been mentioned in the present petition.

In our opinion, in absence of any order of the Court to the contrary, the official records shall prevail. The petitioner cannot be permitted to claim benefit of service rendered after the due date of retirement i.e. 31st July, 1985. Hence, we hold that for the purposes of the computation of the retirement benefits of the petitioner, the relevant date should be 31st July, 1985. The last pay drawn should be the one which he drew on 31st July, 1985. However, the petitioner shall not receive pension and other retirement benefits for the period he continued in service i.e. from 1st August, 1985 till 31st August, 1988.

As held by the Hon'ble Supreme Court, the petitioner should be liable to remit the amount of salary and other benefits received by him after the due date of retirement i.e. 31st July, 1985. However, in the present case, nearly 14 years have passed since the petitioner actually retired from service and the State Government also has not initiated any proceeding to recover the amount of such salary and the other benefits. We, therefore, do not deem it to be proper to order refund of the salary and other benefits received by the petitioner since 1st August, 1985 till 31st August, 1988.

The petition is dismissed with costs. Rule is discharged. Cost is quantified to be Rs.15,000=00. The cost shall be paid within two months from the date of this order. In the event the petitioner fails to pay the amount of cost as directed hereinabove, the respondents shall be at liberty to recover the same from the amount of pension payable to the petitioner.

(Ms. R.M. Doshit, J.)

(Ravi R.Tripathi, J.)

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